

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 824 of 2002****For Approval and Signature:****HONOURABLE MR.JUSTICE J.M.PANCHAL****HONOURABLE MR.JUSTICE H.B.ANTANI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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KANTILAL @ JAYANTI BHAVANBHAI BASIA - Appellant
Versus
STATE OF GUJARAT - Respondent

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Appearance :

Ms. SHILPA R SHAH for Appellant.
MR KT DAVE, A.P.P. for Respondent.

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 21/12/2005**ORAL JUDGMENT****(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)**

Instant appeal filed under Section 374(2) of the

Code of Criminal Procedure, 1973, is directed against judgment dated July 8, 2002, rendered by the learned Sessions Judge, Rajkot, in Sessions Case No.36 of 2002, by which the appellant, who is original accused No.1, is convicted for commission of offence punishable under Section 304 Part-I of the Indian Penal Code and sentenced to suffer R.I. for ten years and fine of Rs.25,000/-, in default S.I. for two years.

2. The facts emerging from the record of the case are as under:

Complainant Pravinbhai Dayaljibhai Nathwani is residing at Raghuvir Para, Street No.5, near the Deli of Labela Ganthiavala, Rajkot. Deceased Bipinbhai was his younger brother. Both the brothers were maintaining themselves by selling sugarcane-juice which was being extracted with the help of a machine. On November 14, 2001, Pravinbhai went to the place where he was selling sugarcane-juice accompanied by his brother Bipinbhai. At about 3.00 P.M., Bipinbhai went home to have lunch. Pravinbhai sold sugarcane-juice upto 9.00 P.M., but, Bipinbhai did not return to the place where Pravinbhai was selling sugarcane-juice after he had gone to take lunch. At night time, Pravinbhai closed his business and went home. He found that Bipinbhai was not present. He

made inquiry about Bipinbhai with son of Bipinbhai, who informed him that Bipinbhai had not returned home. It may be stated that Bipinbhai had habit of consuming liquor. Pravinbhai, therefore, presumed that Bipinbhai must be sitting with his friends and drinking liquor. He, therefore, did not make any search about his brother Bipinbhai. Next day morning, when Pravinbhai got up, he found that Bipinbhai was not present in the home. At about 10.00 A.M. in the morning, he went to attend his business. At that time, a railway policeman informed him that dead body of his brother Bipinbhai was lying near water-tank of Railway Colony. He, therefore, went to the said place and found that dead body of his brother was lying there. He noticed that near water-tank, there were slums, in which the appellant was also residing. He knew that the appellant was selling liquor and thought that a quarrel must have ensued between his deceased brother Bipinbhai on one hand and the appellant and his wife on the other. He, therefore, lodged his complaint on November 15, 2001 with Incharge Police Inspector, Rajkot Railway Police Station, Rajkot. On the basis of the complaint of Pravinbhai, offences were registered and investigation into the case was made by P.S.I. Ghanshyamsinh Mansinh. The investigating officer held inquest on the dead body of the deceased and

requisitioned services of sniffer-dog. The investigating officer visited the hut of the appellant and found bloodstained quilt etc. He drew panchnama of place of incident in the presence of panch witnesses and made arrangement for sending the dead body of the deceased to the hospital for postmortem examination. The investigating officer recorded statements of those persons, who were found to be conversant with the facts of the case. Two accused i.e. appellant and his wife were arrested together, whereas the accused No.3 i.e. Munno @ Udesinh Nandkishor Lodha was arrested under a separate panchnama, on November 16, 2001. While in custody, the appellant made disclosure statement, pursuant to which iron-pipe used by him in commission of crime was recovered. Some of the clothes of the accused were found to be bloodstained and, therefore, they were seized under a panchnama. The incriminating articles which were seized during the course of investigation, were sent to Forensic Science Laboratory ["F.S.L." for short] for analysis. On completion of investigation, the appellant and two other accused, namely, (i) Ms.Parvatiben @ Paru, daughter of Amarshi Tida, and (ii) Munno @ Udesinh Nandkishor Lodha, were chargesheeted in the Court of learned Judicial Magistrate, First Class, (Railway), Rajkot, for commission of offence punishable under Section 302

r.w.Section 114 I.P.C.

3. As the offence punishable under Section 302 IPC is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Rajkot for trial, where it was numbered as Sessions Case No.36 of 2002.

4. The learned Sessions Judge framed charge at Exh.1 against the appellant and two other accused for commission of offence punishable under Section 302 r.w.Section 114 IPC. The charge was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Dr. Pragnaben Dhanjibhai as PW.1 at Exh.8, (2) complainant and brother of the deceased i.e. Pravinbhai Dayaljibhai as PW.2 at Exh.14, (3) Eye witness Edward Dominique Macwan as PW.3 at Exh.16, (4) Suleman Osman as PW.4 at Exh.17, (5) Panch Yunus Kalubhai as PW.5 at Exh.19, (6) Dog-handler Daud Motibhai Bhavar as PW.6 at Exh.21, (7) Assistant Sub-Inspector of Police, Railway Police Station Mr.Natubha Jasubha as PW.7 at Exh.22, and (8) Investigating Officer Ghanshyamsinh Mansinh as PW.8 at Exh.26, to prove its case against the accused. The prosecution also produced documentary evidence, such as: postmortem notes of the deceased prepared by Dr.Pragnaben

at Exh.9, complaint lodged by Pravinbhai at Exh.15, inquest report at Exh.18, panchnama of place of incident at Exh.20, panchnama indicating recovery of weapon pursuant to disclosure statement made by the appellant at Exh.24, panchnama of persons of the appellant and his wife prepared at the time of their arrest at Exh.27, panchnama of person of original accused No.3 drawn at the time of his arrest at Exh.28, report of F.S.L. at Exh.31 etc., in support of its case against the accused.

5. After recording of evidence of prosecution witnesses was over, the learned Sessions Judge explained to the accused the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure. In their further statements, the case of the accused was that they were falsely implicated in the case and were innocent. However, no defence evidence was adduced by any of them.

6. On appreciation of evidence led by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that deceased Bipinbhai died a homicidal death. The learned Judge scrutinized the testimony of eye witness Edward Dominique

Macwan and came to the conclusion that involvement of original accused No.2 i.e. Ms.Parvatiben @ Paru in commission of murder of the deceased was not established at all, whereas it was established by the prosecution that original accused No.3- Munno @ Udesinh had caused simple injuries to the deceased, and the appellant had delivered pipe-blow to the deceased and caused his death. On perusal of testimony of eye witness, the learned Judge noticed that all including the deceased had consumed liquor, after which an altercation had taken place and the appellant had delivered one pipe-blow on the head of the deceased with the intention of causing such bodily injury as was likely to cause death and, therefore, he was liable to be convicted for commission of offence punishable under Section 304 Part-I IPC, whereas the original accused No.3, who had caused simple injuries, was liable to be convicted for commission of offence punishable under Section 323 IPC and the original accused No.2 i.e. Ms. Parvatiben @ Paru was entitled to acquittal. In view of abovereferredto conclusions, the learned Judge has convicted (i) the appellant under Section 304 Part-I IPC and sentenced to suffer R.I. for ten years and fine of Rs.25,000/-, in default, S.I. for two years, (ii) the original accused No.3 for commission of offence punishable under Section 323 IPC and sentenced

him to suffer R.I. for one year and fine of Rs.2000/-, in default, S.I. for two months, and (iii) acquitted the original accused No.2 i.e. Ms. Parvatiben @ Paru, by judgment dated July 8, 2002, giving rise to instant appeal.

7. It may be stated that the original accused No.3, who was convicted for commission of offence punishable under Section 323 IPC and sentenced to suffer R.I. for one year and fine of Rs.2000/-, in default, S.I. for two months, did not challenge his conviction before higher forum by filing appeal and has already undergone sentence imposed on him; whereas acquittal of the original accused No.2 i.e. Ms. Parvatiben @ Paru is not challenged by the State Government by filing separate appeal before this Court.

8. Ms.Shilpa R.Shah, learned counsel of the appellant, contended that testimony of eye witness Edward Dominique Macwan, recorded at Exh.16, at the best establishes that the appellant had delivered a single pipe-blow on the head of the deceased in a scuffle which had ensued between the appellant and the deceased and as the testimony of Dr.Pragnaben establishes that two injuries sustained by the deceased were cumulatively sufficient in

the ordinary course of nature to cause death of the deceased, but not individually, the appellant should be convicted under Section 304 Part-II IPC and sentence of five years should be imposed on him for commission of said offence. The learned counsel submitted that the deceased, after consuming liquor, had picked up quarrel with the appellant at the instance of original accused No.3 i.e. Munno, in which the appellant had also sustained injuries, which is quite evident from the panchnama of person of the appellant prepared at the time of his arrest, and as the prosecution has proved that only one pipe-blow was delivered by the appellant on the head of the deceased, his conviction under Section 304 Part-I IPC deserves to be set aside. The learned counsel of the appellant argued that the facts proved have not been properly appreciated by the learned Judge of the trial Court in true perspective and, therefore, conviction of the appellant should be converted into one punishable under Section 304 Part-II IPC and to that extent, the appeal should be allowed.

9. Mr.K.T.Dave, learned A.P.P. for the State, submitted that reasonable reading of testimony of eye witness Edward Dominique Macwan would establish that both blows, which were found on the head of the deceased, were

delivered by the appellant and, therefore, well-founded conviction of the appellant under Section 304 Part-I IPC should be upheld by this Court. It was argued that testimony of eye witness Edward Dominique Macwan establishes involvement of the appellant in commission of crime and in view of reliable testimony of Medical Officer read with contents of postmortem notes, conviction of the appellant under Section 304 Part-I IPC should not be regarded as erroneous. The learned counsel for the State maintained that cogent and convincing reasons have been assigned by the learned Judge of the trial Court for convicting the appellant under Section 304 Part-I IPC and as the learned counsel of the appellant has failed to dislodge those weighty reasons, the appeal, which lacks merits, should be dismissed.

10. This Court has heard Ms.Shilpa R.Shah, learned counsel of the appellant, and Mr.K.T.Dave, learned A.P.P. for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

11. The fact that deceased Bipinbhai died a homicidal

death is not disputed before this Court by the learned counsel of the appellant. Eye witness Edward Dominique Macwan in his testimony before the Court had stated that pipe-blow was delivered on the head of the deceased, whereas stick-blows were also delivered to him. The testimony of Dr.Pragnaben Dhanjibhai, recorded at Exh.8, shows that she had performed autopsy on the dead body of the deceased and found external as well as internal injuries. The medical evidence shows that the deceased had sustained 22 external injuries. The injuries noticed by the Medical Officer while performing autopsy on the dead body of the deceased are also enumerated in postmortem notes of the deceased produced by the prosecution at Exh.9. The final cause of death of the deceased, as per the medical evidence was "Cardio Respiratory failure due to haemorrhagic shock with polytrauma as a result of assaulted injury". It is nobody's case that the injuries which were found on the dead body of the deceased were anti-mortem or self-inflicted. The suggestion made by the defence to the Medical Officer that injuries could have been sustained by the deceased if he had sustained fall on railway-track, is emphatically denied by her. Thus, this Court finds that the learned Judge of the trial Court was justified in coming to the conclusion that homicidal

death of the deceased was proved by the prosecution. The said finding being eminently just, is hereby upheld.

12. From the evidence brought on record, it is evident that complainant Pravinbhai, who is brother of deceased Bipinbhai is not an eye-witness and, therefore, it would not be relevant to refer to his evidence in detail. The prosecution case hinges on the sole-testimony of eye-witness Edward Dominique Macwan, which is recorded at Exh.16. The Court, thus, finds that it would be relevant to refer to evidence of eye-witness in detail recorded at Exh.16. From his evidence, it is evident that he is residing in Parsana-nagar Christian Colony, Rajkot and is maintaining himself by driving a rickshaw. His evidence further shows that he is knowing the appellant, who was staying in a slum situated near Locoshed. This witness has mentioned in his examination-in-chief that the appellant was selling liquor and that he was visiting the hut of the appellant to purchase liquor. The witness has mentioned that on November 14, 2001, which was Diwali-Day, he had gone to the hut of the appellant to purchase liquor and at that time Munno (original accused No.3), who is friend of the appellant, Bipinbhai (deceased) and Parvatiben (original accused No.2) were present in the hut. After informing the Court that another name of Munno

is Rajesh @ Lodho, the witness has stated that all the four were sitting in the hut of the appellant and were consuming liquor. The witness has mentioned that he had demanded a bag containing liquor and after obtaining the same, he had also started consuming liquor in the hut of the appellant. According to this witness, an altercation had taken place between the deceased and Munna i.e. Original accused No.3 regarding cash, which was being stolen, kept at the machine used to extract juice from sugarcane, which was being operated by the complainant. The witness has mentioned before the Court that a quarrel had taken place between Bipinbhai and Munna, and Munna had informed Bipinbhai i.e. deceased that he (i.e. Munna) was also being assisted by the appellant in taking cash kept on the machine. The witness has stated that thereupon a quarrel had taken place between the appellant and the deceased. According to this witness, he had pacified the deceased and the appellant, but, after sometime, again they had started quarrelling. What is stated by the witness is that the deceased had picked-up a stick, whereas the appellant had brought a pipe from his hut and started quarrelling. According to this witness, Munna, who was original accused No.3, had snatched stick from the hands of the deceased and given stick blows on the deceased, whereas the appellant had

delivered one blow on head of the deceased, as a result of which, the deceased had fallen down and the deceased was apologizing to spare him, as he had misbehaved with the appellant in an inebriated state. The witness has further mentioned that he and Parvatiben i.e. acquitted accused had separated them, after which he had returned home. According to this witness, at about 6.00 A.M. in the morning of next day, he had gone to the house of the appellant to fetch liquor and at that time, all the four i.e. (1) appellant, (2) Ms.Parvatiben (acquitted accused), (3) Munna (original accused No.3), and (4) deceased were sleeping and that the deceased had informed him that no liquor was left out to be sold, as he and others had consumed liquor after the witness had left for his home. The witness has mentioned that as he could not secure liquor from the appellant, he had gone to Madhapar, and at Madhapar also he was not able to get liquor, as a result of which he had returned home and slept. The witness has mentioned that at about 10.00 A.M. again, he had gone to the house of the appellant to consume liquor, but, the appellant was not present, whereas his wife Ms.Parvatiben was present and dead body of the deceased was lying near water-tank. According to this witness, at that time, the police had arrived and had seized bloodstained articles from the hut of the

appellant.

13.1 In cross-examination by the learned counsel of the appellant it was stated by the witness that several cases for consumption of liquor were registered against him and that he was also externed from Rajkot district for a period of two years. The witness has further stated in his cross-examination that neither the appellant nor Munna (original accused No.3) had any reason to kill the deceased. The suggestion made by the defence that Munna and the appellant as well as the deceased had lost all senses after consuming liquor, was accepted by the witness. The suggestion made by the defence that Ms.Parvatiben i.e. acquitted accused had not assaulted the deceased, was also accepted by the witness. What is mentioned by the witness in his cross-examination is that while consuming liquor, a quarrel had taken place between Munna and the deceased. The witness has further stated in his cross-examination that the deceased was alive till he had left the hut of the appellant. During the course of cross-examination by the learned counsel of the original accused No.2, it was stated by the witness that the original accused No.3 i.e. Munna had not given any stick blow on the head of the deceased. This is all what transpires from the testimony of sole eye-witness.

14. On reappreciation of evidence of eye-witness Edward Macwan, this Court finds that in an inebriated state a quarrel was picked up by the deceased, initially with the original accused No.3 and thereafter with the appellant. His evidence further shows that the deceased had picked up a stick to assault the appellant, whereas the appellant had brought a pipe to assault the deceased. The evidence of the eye-witness makes it very clear that when the deceased was quarreling with the appellant, Munna i.e. original accused No.3 had snatched the stick from him, and during this course, the appellant had delivered one blow on the head of the deceased; whereas Munna, who was original accused No.3, had caused simple injuries by giving stick blows to the deceased. It is well to remember that after the appellant had fallen down, he was apologizing to the appellant. What is relevant to notice from the evidence of the eye-witness is that after intervention by him and acquitted accused Parvatiben, all had stopped quarreling and had again consumed liquor, as a result of which, the witness could not get liquor in the morning of next day. It is also relevant to notice that in the morning of next day, the witness had found the deceased sleeping in the hut of the appellant. The panchnama of person of the appellant

prepared at the time of his arrest makes it evident that he had sustained bleeding injuries. The medical evidence on record shows that cumulative effect of two injuries found on the head of the deceased was sufficient in the ordinary course of nature to cause his death. It means individually none of the two injuries was sufficient in the ordinary course of nature to cause death of the deceased. In view of facts narrated by the eye-witness, this Court is of the opinion that Exception-4 appended to Section 300 IPC would be applicable to the facts of the present case. Exception-4 to Section 300 IPC, inter alia, provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. The facts of the case would show that there was no premeditation on the part of the appellant in committing murder of the deceased. The quarrel had taken place all of a sudden and in a sudden fight, and in the heat of passion, the appellant had delivered only one pipe-blow. The record does not indicate that the appellant had taken undue advantage of the situation or acted in a cruel or unusual manner. On the contrary, the evidence on record shows that after the deceased and the appellant were separated by eye-witness Edward Macwan and

Ms. Parvatiben, who is the acquitted accused, all had consumed liquor and slept well in the hut. Therefore, there is no manner of doubt that the provisions of Section 304 IPC would be applicable to the facts of the case, as the appellant committed homicidal death not amounting to murder. As observed earlier, the appellant, the deceased and Munno were friends. In fact, the deceased had gone to the hut of the appellant to consume liquor. If relations between the deceased and the appellant had been strained, the deceased would not have gone to the hut of the appellant to consume liquor. The narration of facts made by the eye-witness would indicate that all of a sudden a quarrel had taken place. Therefore, it is difficult to attribute intention to the appellant of causing such bodily injury as was likely to cause death of the deceased. At the best, what can be attributed would be that the act of delivering one blow on the head of the deceased was done by the appellant with the knowledge that it was likely to cause death, but, without any intention to cause death, or to cause such a bodily injury as was likely to cause death and, therefore, the case would be governed by the provisions of Section 304 Part-II IPC. In view of these findings, the appeal will have to be partly accepted and the conviction of the appellant recorded under Section 304

Part-I IPC will have to be converted into one punishable under Section 304 Part-II IPC.

15. This Court has heard the learned counsels of the parties on the question of sentence to be imposed on the appellant for commission of offence punishable under Section 304 Part-II IPC. This Court has also taken into consideration the mitigating circumstances which were pointed out by the appellant before the trial Court when he was heard on the question of sentence to be imposed on him for commission of offence punishable under Section 304 Part-I IPC. Having regard to the manner in which the incident had taken place and the attending circumstances, the Court is of the opinion that interest of justice would be served if the appellant is sentenced to R.I. for five years and fine of Rs. 1000/-, in default, R.I. for six months, for commission of offence punishable under Section 304 Part-II IPC.

For the foregoing reasons, the appeal partly succeeds. Judgment dated July 8, 2002 rendered by the learned Sessions Judge, Rajkot, in Sessions Case No. 36 of 2002 convicting the appellant for the offence punishable under Section 304 Part-I of the Indian Penal Code and sentencing him to R.I. for ten years and fine of

25,000/-, in default, S.I. for two years is hereby set aside. Instead, the appellant is convicted for commission of offence punishable under Section 304 Part-II I.P.C. and for commission of said offence, the appellant is sentenced to R.I. for five years and fine of Rs. 1000/-, in default, R.I. for six months. The appeal is allowed only to the extent indicated hereinabove. Muddamal be disposed to in terms of directions given by the learned Judge in the impugned judgment.

[J.M.PANCHAL, J.]

[H.B.ANTANI, J.]

(patel)